

# COVID-19 in South Africa: A Year in Review

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2021-03-11T11:00:30

## Accountability and Oversight in South Africa's State of Disaster

On 5 March 2020, South Africa's Institute for Communicable Diseases (NICD) recorded its first case of COVID-19. The number of cases rose slowly at first and the immediate state response focused on encouraging regular hand washing and social distancing. However, many South Africans live in informal settlements and very cramped conditions, with homes that [lack running water](#), making self-isolation or quarantine impossible. Concerns arose that the [high incidence of HIV, TB and HIV/TB co-infection](#) would make the population more susceptible to COVID-19 and its severity. There were also concerns about the impact that COVID-19 would have on the already [over-stretched public health system](#), and its ability to respond. On 15 March 2020 with only [61 cases and 0 deaths](#) recorded, President Ramaphosa quickly decided that swift action was required and declared a state of disaster. Despite this quick action, South Africa has recorded the [highest number of cases in Africa](#). This post will consider whether its response has been legitimate, proportionate and subject to appropriate judicial oversight.

## State of Emergencies and States of Disasters

In responding to COVID-19, President Ramaphosa had two options: either to declare a national state of disaster or a state of emergency. The power to declare a [state of emergency](#) derives from Section 37 of the [Constitution](#). It must be declared within the terms of the State of Emergency Act 1997 and can be done when "the life of the nation is threatened by...public emergency". Under a state of emergency, there can be derogations from the Bill of the Rights, except for non-derogable rights (the rights to dignity, life and a fair trial). A state of emergency lasts for 21 days and is extendable by parliament only. The initial extension requires a majority vote; any subsequent extension requires a 60% majority.

The courts retain a supervisory role and any court has the power to decide upon the validity of the state of emergency, an extension, or any regulations promulgated as part of the state of emergency. A state of emergency has not been declared since the foundation of a democratic South Africa in 1994. Under apartheid it [enabled President PW Botha](#) from 1985-1990 to rule by decree, detain citizens without trial, restrict the freedom of movement, and give the police and military considerable powers. Its [association with apartheid](#) is likely to be one of the factors why President Ramaphosa opted for a state of disaster instead of a state of emergency.

The power to declare a state of disaster derives from the [Disaster Management Act 2002](#) and not the Constitution. The 2002 Act gives the relevant Minister the power to declare a state of disaster when there is a “progressive or sudden, widespread or localised, natural or human-caused occurrence which causes or threatens to cause death, injury or disease...”. A state of disaster lasts for three months and can be extended by the Minister for one month at a time. Rights may be limited, but not derogated from, and all regulations promulgated must conform to the Bill of Rights. The courts retain a supervisory role and can declare a state of disaster or any of the regulations promulgated invalid. However, there is no clear oversight role for parliament. Although it may continue to meet, limitations on freedom of assembly may impact the ability of parliament to convene.

## Life under a State of Disaster

On 15 March 2020 a state of disaster was declared, which has been continuously extended to date (24 February 2021). Since then, [COVID-19 regulations](#) have been promulgated, and are updated regularly. These regulations limit the freedom of movement and assembly, restrict the sale and movement of goods, limit the right to privacy, and criminalise certain conduct that may promote the transmission of COVID-19.

On 1 May 2020, a [5-tier risk adjusted strategy](#) was introduced and since then the level of restrictions depends on the relevant tier that applies to the country at a specific point in time. The [criteria to determine](#) the alert levels were gazetted on 7 August 2020 and these are determined by COVID-19 epidemiological trends, capacity of the health system to respond, and any other factor influencing the level of infection, hospitalisation and mortality. The changes in lockdown levels are normally broadcasted via [a statement by President Ramaphosa](#) to the nation. These announcements have been welcomed and appreciated by most South Africans. They are seen as promoting transparency of the reasons informing the lockdown restrictions, and [promoting social solidarity among South Africans](#), the latter described as a feature of South African nationhood.

## The Role of Parliament and the Executive

Under the state of disaster there is no direct oversight role for parliament in the COVID-19 response. Parliament continues to function and carry on with its responsibilities, but parliament’s role with regard to the management and oversight of COVID has been suspended with the delegation of these functions to Minister Dlamini-Zuma, Minister for Cooperative Governance and Traditional Affairs. However, on 16 April 2020, parliament [announced](#) that virtual committees would resume with work that relates to the oversight of government departments driving COVID-19 response measures, with [some committees](#) receiving COVID-19 updates.

A number of bodies have also been established to support the President. The National Coronavirus Command Council (NCCC) established on 17 March 2020 is comprised of [cabinet ministers and experts and chaired by the President](#). Its

discussions and decisions are informed by the National Joint Operational and Intelligence Structure (NatJoints). NCCC decisions are then [put forward to cabinet](#) for approval before announced by President Ramaphosa.

## Scientific Oversight

The NCCC and cabinet are supported by Ministerial Advisory Committees (MACs). The [National Health Act 2003](#) provides that, in consultation with the National Health Council, the Minister for Health may establish an advisory committee deemed necessary to achieve the objectives of the Act. When such a committee is established, the Minister must provide notice in the *Gazette* of the composition, functions and working procedure of the committee, the terms, conditions, remuneration and allowances applicable to members of the committee, and any other incidental matters. South Africa has a good tradition in establishing such committees, [having established MACs on topics ranging from e-health to mental health and national health insurance](#).

In total, [three MACs](#) have been established during the course of COVID-19: the MAC on COVID-19 (established on 30 March 2020); the MAC on Social and Behavioural Change (established on 16 June 2020); and the MAC on COVID Vaccines (established on 14 September 2020). Although the NCCC is under no obligation to follow the advice of the MACs, the government has stressed that it has followed [more than 95%](#) of the advice rendered by the NCCC. In an apparent effort to improve transparency, the government [announced](#) on 27 August 2020 that it will be making all of the advice of the MACs [publicly available](#).

While the expertise of the MACs membership is not in doubt, there has been some criticism. First, the establishment of these MACs have not been gazetted and the [terms of reference](#) for the MAC on COVID-19 are available only through the [Bhekisisa Centre for Health Journalism](#), not the Department of Health.

Second, the government has not taken kindly to any public criticism directed at it by members of the MACs. In May 2020, Professor Glenda Gray (President of the Medical Research Council (MRC) and then a member of the MAC on COVID-19) criticised the government's phased exit from the lockdown as ["unscientific and nonsensical"](#). The Minister of Health [issued a public statement](#) arguing that Professor Gray had made "factually incorrect and unfounded statements". The Department of Health also [requested the MRC](#) to conduct an investigation into Professor Gray on the basis that she "made a number of false allegations against the media" that were "damaging to the government's COVID-19 response". This was met with outcry from the scientific community and [concerns were expressed](#) about the right of academic freedom.

The MAC on COVID-19 was dismissed on 25 September 2020. The Minister stated that this was due to the [changing nature of the pandemic and the need to include social and behavioural scientists](#). However, it was [reported](#) that it was partly due to criticism of the government by members of the MAC, with [one former member](#) of

the MAC arguing it was due to the MAC's refusal to endorse government decisions (Professor Gray was not reappointed).

Outside of MAC membership, the government initially sought to restrict other experts from criticising its approach in the media. Experts on COVID-19 [were initially instructed](#) not to speak to the media, but to direct all queries to the NICD instead. However, recent months have seen more experts engaging with the media, policymakers and the public, notably Professor Salim Karim, epidemiologist and Chair of the Ministerial Advisory Committee on COVID-19. Professor Karim, along with Dr Anthony Fauci, Director of the United States' National Institute of Allergy and Infectious Diseases (NIAID), was awarded the [2020 John Maddox Prize for promoting and enabling public understanding of COVID-19](#) through his clear communication of the science behind the pandemic. The effective coordination of different scientific insights from diverse disciplines should continue. It is necessary to manage the pandemic more efficiently and [better plan for a range of scenarios for future infection, morbidity and mortality](#), but it is important that divergent views are not silenced. However, despite the role of scientists' insights on these issues, [we cannot rely on scientists alone](#) to make determinations on issues that affect us all.

## Judicial Scrutiny

Although a direct supervisory role for parliament is lacking, throughout the state of disaster, any regulations promulgated must pass the test of [rationality](#) (as is indeed the requirement for any legislation and regulation generally). In [Khosa v Minister for Defence](#), the High Court stated that rationality is a rule of law requirement which must be assessed objectively, and that it is irrelevant whether the decisions or regulations were made mistakenly or in good faith.

It is on this point of rationality that some of the COVID-19 regulations were struck down (although the declaration of the state of disaster was upheld) in [De Beer v Minister of Cooperative Governance and Traditional Affairs](#). The specific regulations at the time permitted 50 persons to attend a funeral and minibus taxis could continue to operate with people sitting in close proximity to one another. Despite this, the Court observed that some of the regulations caused many who work in the informal sector and who would have limited interactions with others, to lose their right to "eke out a livelihood". It also found that restricting physical exercise to "arbitrarily determined time periods is completely irrational". The Court found that the government's approach was focused on reducing the incidence of COVID-19 with little or no consideration of whether the limitation on rights was justifiable. The Court found the government's approach to be paternalistic and not constitutionally justified.

Over the past year, whilst the declaration of the state of disaster continues to be upheld, further regulations have been struck down. In January 2021, the regulations that restricted exercise to certain hours and the ban on the sale of hot food in shops were [found to be invalid](#) for failing to meet this test of rationality. At various times during the state of disaster, the sale of cigarettes has been prohibited. This [ban](#) was successfully [challenged](#) on the grounds that it does not achieve its stated purpose (i.e. reduce the incidence of smoking) and that the Minister had not demonstrated

that the constitutional rights of smokers, tobacco farmers and tobacconists were not violated. The government is [appealing this ruling](#). A similar [ban on the sale of alcohol](#) is now being [challenged](#) on the basis that it goes beyond what is reasonable and necessary to stop the spread of COVID-19.

Access to the courts is a crucial balancing check on the power that remains centralised with the Minister and the NCCC. Various individuals, political parties and lobby groups have challenged many of the COVID-19 regulations and will likely continue to do so. However as South Africa enters a second year of COVID-19, questions must be asked about whether it is appropriate for the courts to remain the only branch with direct oversight powers. The longer the period during which parliament is not directly involved in the management of the COVID-19 pandemic, the greater the risk that the vital principle of checks and balances vis-à-vis the executive may be jeopardised, opening the door for [possible excesses of power and public resource utilisation or mismanagement](#).

## COVID-19 and South Africa in 2021

In January 2021, many South Africans returned to their homes and to work after the summer break, but it was not the start of the year that many would have hoped for. The country was in the midst of its second COVID-19 wave and it has the unfortunate distinction of having the highest number of [confirmed COVID-19 cases](#) in Africa. The so-called South African variant began to spread in late December causing many countries to [shut their borders](#) with South Africa due to fears that it could be much more transmissible and [some of the vaccines less effective](#) against this variant. However, it is the [government's handling of vaccine procurement](#) that has faced most attention and criticism in 2021.

South Africa has been a [site of many COVID-19 candidate vaccines](#) clinical trials and Johnson and Johnson is [producing its COVID-19 vaccines in South Africa](#). Yet these vaccines are to be exported, and compared to other low and middle income countries that are [already administering the vaccine](#), South Africa's vaccination program only began in February 2021 [as part of a clinical trial](#). The Chairperson of the MAC on Vaccines, Barry Schoub, had decided to shelve direct procurement talks with pharmaceutical companies in favour of COVAX in the second half of 2020. Yet the government failed to meet the 15 December [deposit deadline for the COVAX vaccines](#). Additional vaccines to supplement the COVAX program [have been announced](#), but it has since emerged that South Africa is [paying almost double](#) in comparison to other countries for its first batch of the AstraZeneca vaccine. One dose of AstraZeneca costs the EU \$2.16 (around ZAR32) and the African Union \$3 (ZAR45), but the South African government is paying \$5.25 per dose (ZAR80). Storage and distribution of vaccines will also be a challenge as South Africa's electricity provider (Eskom) announced routine electricity [load shedding that will be implemented until September 2021](#). In addition, [anti-vaccine protests](#), and anti-vaccine [comments by Chief Justice Mogoeng Mogoeng](#) (against whom a [formal complaint has been lodged](#)) could indicate that the take-up of the vaccine may be met with some reluctance or hesitancy.

With such issues currently impeding the national vaccine programme, South Africa will need to rely on prevention and containment measures for the moment. There will thus likely be movement between the various tiers during 2021 to control COVID-19. However, recurring lockdowns are exacerbating the socio-economic conditions many are living in. A continuously high unemployment rate of around 20% during the past ten years rose to [30.8%](#) in the last quarter of 2020. The economy lost [US \\$1.49 billion \(1.7%\) of GDP](#) during the second quarter of 2020. Lower GDP growth and increasing unemployment directly correlate with increasing poverty rates. This is particularly devastating for South African women and [female-headed households](#), because their income derive from lower-skilled work in general, and also [asylum-seekers, refugees, and undocumented migrants](#) have been left out of the economic response. [Gender based violence](#) has also increased during the lockdowns. As South Africa awaits the roll-out of vaccines, it is likely that the socio-economic impact of the pandemic will be starkly felt by already marginalised and vulnerable groups.

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